United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

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74-2097

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2097

UNITED STATES OF AMERICA,
Appellee,

—*against*—

MARVIN LITTLE and JAMES SMALLWOOD,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Preliminary Statement

Marvin Little and James Smallwood appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Mishler, *Ch.J.*), entered August 9, 1974. Appellants were convicted, after a jury trial, of one count of conspiracy to knowingly and intentionally distribute, and possess with intent to distribute, heroin (Title 21, United States Code, Section 846); three counts of knowingly and intentionally possessing heroin with intent to distribute (Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)); and two counts of knowingly and intentionally distributing heroin (Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)).* On August 9, 1974 Judge Mishler sentenced appellant Little to five years imprisonment and a special parole

* The indictment alleged a total of approximately 341 grams. See Appellants' Appendix at A-1.

term of five years on each count, said sentences to run concurrently. Appellant Smallwood was sentenced on each count to imprisonment for a year and a day and a special parole term of three years, his sentences also to be served concurrently. Both appellants are free on bail pending this appeal.

On appeal, appellants assert four grounds upon which they allege their convictions should be reversed. The first two of these alleged grounds relate to the conduct of the trial, while the second two concern the admission into evidence of tape recordings of conversations between appellants and Government informant John McCrea. Appellants claim first that the trial court erred in not permitting defense counsel to question McCrea with respect to an alleged possible motive to lie. It is also argued by appellants that Judge Mishler's intervention in the cross-examination of McCrea and his alleged simultaneous expressions of "displeasure and annoyance" with defense counsel deprived appellants of a fair trial. Appellants claim thirdly that the trial court abused its discretion by admitting into evidence tape recordings of a conversation between appellant Smallwood and McCrea on November 30, 1973, claiming that since substantial portions of these tapes were allegedly "inaudible and unintelligible," it was prejudicial for them to be played to the jury. In addition, it is argued generally that the admission into evidence of tape recordings of conversations between McCrea and appellants violated appellants' Fourth Amendment rights to privacy.

Statement of Facts

John McCrea was the Government's major witness against appellants. He identified himself as a paid undercover informant, who had been working for the Drug Enforcement Administration (DEA) since the fall of 1972 (36-38, 334).* As an informant, McCrea's job was to introduce agents to narcotics dealers so that the agents could make undercover purchases of drugs from the dealers; if for some reason an agent could not be introduced to a particular dealer, then McCrea, under the direction of the agents, would himself purchase drugs from the dealer (37, 470). McCrea stated that he was paid for his work, regardless of whether or not an arrest or conviction resulted, whenever he purchased narcotics in the above manner, or whenever he introduced an agent to a dealer and the agent then purchased narcotics from the dealer (38). McCrea also testified that he had already been paid for his work in appellants' case and that he was entitled to no additional funds from the Government (224-225).

McCrea admitted to two prior convictions, attempted possession of a dangerous weapon and attempted reckless endangerment.** In addition, he stated that in the past

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* All references are to the trial transcript unless otherwise indicated. References to pages up to 463 are to McCrea's testimony. References to pages between 468 and 648 are essentially to the corroborative testimony of the surveillance agents of the Drug Enforcement Administration and the Government Chemist.

** In February of 1972 McCrea pled guilty to the charge of attempted possession of a dangerous weapon; he was sentenced to one year in jail (32, Defendant's Exhibit B). See New York Penal Law, §§ 110.10-4 and 265.05-1. In November of 1973 McCrea pled guilty to attempted reckless endangerment; for this offense he was given a conditional discharge (32-33). See New York Penal Law, §§ 110.05-6 and 120.20. McCrea also testified that agents of the DEA spoke to the state court judge on his behalf with respect to the reckless endangerment charge (34); this testimony was corroborated by DEA Agent Robert Jones (514-515, 555-558).

he himself had sold heroin, cocaine and marijuana. However, while he admitted that he had "snorted" cocaine and smoked marijuana, he denied that he had ever used heroin (35-36). McCrea said that he decided to work for the Government because he needed the money and because he came to realize the harm that drugs were doing to young people (36, 37). McCrea also told the jury that he was not under indictment or charged with any criminal offense and that it was not a condition of his parole that he work for the Government as an informant (225).

The conspiracy for which appellants were convicted began to unfold on the night of October 17, 1973, when McCrea met appellant Marvin Little, whom he then knew as "Red," on the corner of Jefferson and Tompkins Avenues in Brooklyn and discussed with him the purchase of heroin. Little disclosed to McCrea that he could provide him with an ounce of heroin at a price of between fifteen and $1,600. Accordingly, it was agreed that the two would meet again the next night at the 372 Club on Tompkins Avenue (40-43, 48).

The next day, after notifying Agent Jones of his meeting with Little, McCrea reported to DEA headquarters in Manhattan. There, he was searched for drugs and given $1,500, and a Kel * transmitter was placed on his body (47-48, 470, 472). Thus outfitted, McCrea was driven by Agent Thomas Lentini to the vicinity of the 372 Club for his agreed meeting (572). After a short wait on the street McCrea met appellant Little and went with him into a nearby barbershop. Inside the barbershop, appellant Little told McCrea that the heroin would be there shortly, and

* The Kel was placed on McCrea to enable surveillance agents to overhear and record what was being said in McCrea's presence (48). Agent Jones described the Kel unit as consisting of a transmitter and multiple receivers. The transmitter was worn by McCrea under his clothing and had attached to it a microphone which was placed near the chest region (471).

McCrea was asked to go wait inside the 372 Club for the actual delivery (49).

At approximately 6:40 P.M. McCrea entered the 372 Club. Thereafter, he was joined at the bar by Little (472-473) and appellant Smallwood, who was then using the name "Baby Brother" (40, 50-51). Little then gave McCrea two packages containing heroin (634-639). After Little disclosed that the smaller of the two packages was only a sample and that the larger package contained less than the previously agreed upon ounce, it was decided that McCrea would pay $1,200 for the narcotics he was then getting and an additional $300 for the balance of the purchase (51, 53-54). After completing the delivery of the two packages and receiving their money, Little (474-475) and Smallwood left the 372 Club. McCrea remained at the bar, however, and later that evening appellant Smallwood returned with the additional narcotics (640-641). After McCrea had paid his $300 and received the package, Smallwood confided that he should get in touch with him whenever he wanted drugs (59-61). Shortly thereafter, McCrea left the 372 Club and turned over to Agent Jones the heroin which he had purchased (60, 475-477).

Two weeks later, on the morning of November 2nd, McCrea met appellant Little on the corner of Jefferson and Tompkins Avenues to discuss the purchase of two ounces of heroin. After some dickering over price, Little stated that he would supply the desired amount for about $2,600 (64). Later that day McCrea reported to Agent Jones at DEA headquarters. There, he placed two telephone calls to Little at the barbershop where the pair had met on the evening of October 18th (58-59, 65). In the second of these conversations, both of which were recorded by Agent Jones (478, Government Exhibits 1-B and 1-C; Government's Ap-

pendix 1a, 2a),* it was agreed that McCrea and Little would meet that evening at Junior's, a bar and grill located in Brooklyn (Government's Exhibit 1-C). After being driven to Junior's (480), McCrea made several phone calls (481-482) to the barbershop. Over the telephone Little stated that he was busy and asked if he could send someone else in his place. Eventually, when Little failed to appear with the narcotics, McCrea left the bar (78-79).

On the afternoon of November 5th, McCrea placed a telephone call from Agent Jones' office to appellant Little (484). Over the telephone McCrea and Little agreed once again to meet at Junior's to consummate their transaction (Government's Exhibit 1-D; Government's Appendix 3a). As on November third, McCrea was then driven by the agents to Junior's (488-489). Once again, however, Little did not appear, indicating instead over the telephone that he wanted to send someone else in his place (82-85).

The next day, November the sixth, McCrea met appellant Little on Jefferson Avenue at about 9:30 in the morning. After McCrea had complained about Little's failure to appear at Junior's on the third and the fifth, Little announced that he had the narcotics and that he was ready to do business. This time, however, he suggested a meeting place, the Phase III Lounge in Brooklyn, stating that the deal could be done that day (84-85). At this time he also gave to McCrea a slip of paper with the address and telephone number of the Phase III written on it (85-86, 490).

Around noon on November 6th McCrea reported to Agent Jones' office. After being searched for drugs, given

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* References to Government Exhibits are to the transcripts of recorded telephone conversations. These transcripts, which were admitted in evidence when the actual recordings were played to the jury, are contained in the Government's Appendix. See Judge Mishler's Memorandum of Decision of May 20, 1974 (Appellant's Appendix at A-8). The originals of these recordings are available, should the Court wish to listen to them.

$2,600 and having a Kel transmitter placed on his body (489-490), he was driven by Agent Gerald Carr in a taxi to the Phase III (87-88, 94, 603). When McCrea arrived at the Phase III, he went inside and went to the bar where he met appellants. Joining them in a drink, McCrea asked them if they had his "merchandise." When it was replied that they did, Little, Smallwood and McCrea adjourned to the bathroom. There, they completed their transaction. Appellant Smallwood showed McCrea, and handed over to him, the two ounces of heroin, while McCrea paid to appellant Little the $2,600 purchase price (94-97, 642-644). Shortly after completing the above purchase, McCrea left the Phase III. As he was leaving, however, he persuaded Smallwood to join him on the sidewalk (604). While McCrea and Smallwood were outside, a video tape and photographs were taken of them by agents conducting surveillance. This segment of video tape and these photographs were later identified by McCrea and admitted in evidence at the trial (98-102, 109). After leaving the Phase III, McCrea entered the cab driven by Agent Carr and turned over to him the heroin which he had purchased from appellants (605-606).

The final stage of the conspiracy began on November 20th. On that day, McCrea met with appellant Little on the corner of Jefferson and Tompkins Avenues and discussed with him the purchase of an eighth of a kilogram of heroin. A price of $4,700 was tentatively agreed upon, and Little said that he would make arrangements to get the drugs (109-110).

On the following day McCrea placed two telephone calls to appellant Little from DEA headquarters (493-494). Over the phone Little indicated that he and Smallwood were "still waiting" but that he expected to have the heroin soon (111-112; Government Exhibits 2-B and 2-C; Government's Appendix 4a, 5a).

Unable to effect a purchase on the 21st, McCrea next contacted appellant Little on November 25th. Little said that he would be in touch with McCrea when he had the narcotics, and a meeting was set for November 28th (133-134).

On November 28th McCrea placed a pair of calls to appellant Little at the barbershop. Both of these calls were made from Agent Jones' office and were recorded (495-497). In these conversations it was agreed that Little and McCrea would meet that afternoon at the Phase III (Government's Exhibits 2-D and 2-E; Government's Appendix 6a, 7a).

After completing the above calls, McCrea was equipped with a Kel transmitter, given $5,000 and driven to the Phase III by the agents (497). Once there, however, he ran into appellant Smallwood. Upon being told that McCrea had come to purchase the eighth of a kilogram of heroin from Little, Smallwood confided that he also could help McCrea. McCrea said that it made no difference to him whom he did business with, because he considered Little and Smallwood to be partners anyway. Smallwood replied that this was true. He added, though, that he and Little had different connections from which they got their narcotics (140-141, 143). At this point Smallwood volunteered to provide the heroin himself and asked McCrea if he had the money on him. After being shown the $5,000 which McCrea had with him, Smallwood left the Phase III, saying that he would be back around 7:30 with the drugs (142). Eventually, however, when Smallwood failed to reappear, McCrea left the bar and returned to Agent Jones the money he had been given (145, 500). In a telephone conversation with McCrea later that evening Smallwood disclosed that he had not returned because of the police in the area (156).

At approximately 5:30 on the afternoon of November 29th McCrea arrived at DEA headquarters. From there,

he placed recorded phone calls (500-501) to both appellants. Over the telephone appellant Little intimated that he also had been scared away from the Phase III on the previous night by the police. He suggested, however, that he was now ready to do business (157; Government's Exhibit 2-F; Government's Appendix 8a). McCrea then called appellant Smallwood at his home. When asked by McCrea when he expected to have the narcotics, Smallwood replied that his man was supposed to have made a delivery at 4:00 but that he was still waiting. Smallwood then stated to McCrea that if his connection did not arrive shortly, he would go out and get the merchandise himself (158; Government's Exhibit 2-G; Government's Appendix 9a). Later that evening McCrea had another telephone conversation with Smallwood. At that time Smallwood advised that his connection had still not arrived, and he stated that he was waiting for the "guy" with the "true things." Suggesting to McCrea that he should do what he could on his own to get the heroin, Smallwood lamented that he had to get "something" soon (159; Government's Exhibit 2-H; Government's Appendix 10a).

On the morning of November 30th McCrea met appellant Smallwood on the corner of Jefferson and Tompkins Avenues. At this time Smallwood disclosed that he had about three ounces of heroin at his apartment. He and McCrea then entered a cab and drove to an address on Ralph Avenue. Inside, McCrea waited in the living room while Smallwood went into the bedroom, returning in a moment with the promised three ounces. At that point McCrea said that he would make a purchase. It was accordingly agreed that Smallwood would bring an eighth of a kilogram of pure heroin to McCrea's house that evening, where McCrea would be waiting with $5,000 (166-168).

Having advised Agent Jones of the plans he had made with Smallwood, McCrea arrived at DEA headquarters late on the afternoon of the 30th (168-169). Upon his arrival, McCrea was searched for drugs. He was then given $5,000,

outfitted with a Kel transmitter and driven by the agents to the apartment where he was staying (502-503). Entering the apartment at approximately 5:30, McCrea joined in a party which was already in progress there. This party apparently involved McCrea's sister and friends not connected with the narcotics conspiracy (168-171). Appellant Smallwood arrived at the apartment around 8:00 (509). When asked by McCrea if he had the heroin with him, Smallwood responded by turning down the top of his trousers to reveal a checkered bag (172-173). After notifying the surveilling agents over the Kel that he had made contact, McCrea joined Smallwood at the party for a drink. Shortly thereafter, at approximately 8:45 P.M., he and Smallwood left the party, went outside and entered a car owned by McCrea's girlfriend (175-176, 510).

Followed by the surveilling agents (510-511), the pair drove around the neighborhood. In the course of this drive McCrea tasted the contents of the package in order to test the quality of the narcotics. This tasting drew the comment from Smallwood that the only way McCrea could know how good the heroin was was to have someone "shoot" it. McCrea and Smallwood then discussed the price that McCrea was to pay for the package. It had previously been agreed that McCrea was to receive an eighth of a kilogram of pure heroin. The package which Smallwood had brought to the apartment that night, however, was diluted heroin, although its weight was approximately an eighth of a kilogram (178-180, 644-646). Accordingly, it was decided that McCrea would pay $2,000 at that time for the package which he was getting and $3,000 when he received the balance of the narcotics he had seen earlier that day at Smallwood's apartment (178-181). Following some additional conversation, McCrea and Smallwood drove back to the apartment where McCrea was staying (181, 511).*

* As indicated above, McCrea was wearing a Kel transmitter on the night of November 30th. The surveilling agents received

[Footnote continued on following page]

Upon arriving back at the house, McCrea placed the heroin in the glove compartment of the car. He then went inside the building, ostensibly to get the money to pay Smallwood for the narcotics (202). Inside, McCrea advised Agent Jones over the Kel that he had the narcotics, and a few minutes later when McCrea returned to the car, he and Smallwood were arrested, and the eighth of a kilogram of heroin was recovered from the glove compartment (203-207, 577, 608).* Seized from appellant Smallwood at the time of his arrest, by Agent Lentini, was a slip of paper bearing the phone number and the address of the apartment where McCrea was staying (583). This slip of paper was admitted in evidence at the trial (583). Agent Lentini also testified that after Smallwood was taken into custody, he made a spontaneous remark to the effect that he did not know McCrea but was just getting a ride across town (580-582).**

Neither appellant testified in his own behalf. The only witness called by the defense was a Mrs. Selma Dove. On direct examination Mrs. Dove testified that she had known

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and recorded the transmission coming from the Kel on McCrea's body (504-510, 609). Those portions of the recorded conversations which Judge Mishler determined were relevant and audible were played to the jury. In view of the fact that there was no stipulation by counsel as to the accuracy of transcripts, however, the transcripts of these conversations were not given to the jury. See Judge Mishler's Memorandum of Decision of May 20, 1974 (Appellants' Appendix at A-8). The originals of these recordings are available, should the Court wish to listen to them.

* Appellant Little was arrested at approximately 12:30 A.M. on the morning of December 1, 1973, in the vicinity of the Tip Top Lounge in Brooklyn (610-611).

** Also testifying for the Government, in addition to McCrea and the agents, was forensic chemist Jeffrey M. Weber. Mr. Weber testified concerning his analyses of the substances purchased from appellants on October 18th and November 6th, and seized from inside the car on November 30th.

McCrea since 1969 and that in the community he had a reputation for untruthfulness (681, 685). Mrs. Dove also stated that she had been convicted once of mail theft (685-686).

On cross-examination it was established that Mrs. Dove's knowledge of McCrea's reputation for a lack of veracity was based on a conversation which she had in 1972. Mrs. Dove also testified that she had first met the appellants at the 372 Club and that when she saw them together they were usually on Jefferson Avenue (690, 689).

ARGUMENT

POINT I

Judge Mishler properly limited the cross-examination of the informant-witness.

Appellants claim that Judge Mishler committed reversible error when he refused to permit defense counsel to cross-examine Government witness John McCrea concerning the facts of an incident in which he was involved on September 9, 1972. It was this incident which gave rise to McCrea's guilty plea, in November of 1973, to the charge of attempted reckless endangerment, a class B misdemeanor, for which he was given a conditional discharge in 1974, prior to appellants' trial (32-33, 358-359).* While Judge Mishler permitted questioning as to the conviction itself, he did not allow any inquiry into the facts of the incident underlying the conviction (341-350). Appellants argue that this ruling wrongfully deprived them of an opportunity to bring forth evidence which they allege would have shown motive to lie and interest and bias on the part of McCrea.

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* See New York Penal Law, §§ 110.05-6 and 120.20.

In the Second Circuit, certain well established rules govern the permitted scope of cross-examination aimed at revealing motive, interest and bias.

Generally, defense counsel is to be given wide latitude in questioning a Government witness, when the purpose of the questioning is to show possible motives for testifying falsely. *United States* v. *Lester,* 248 F.2d 329, 334-335 (2d Cir. 1957); *United States* v. *Wolfson,* 437 F.2d 862, 874-875 (2d Cir. 1970). Ultimately, however, it is for the trial judge, in the exercise of his sound discretion, to determine the proper limits of cross-examination. *Alford* v. *United States,* 282 U.S. 687, 694 (1931); *United States* v. *Kahn,* 472 F.2d 272, 281 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973).

The trial court's determination in each case must, of course, be based upon the particular facts involved. Nevertheless, it is clear that there are certain standards which are to be applied in ruling on the proper extent of the cross-examination. In the first place, the circumstances about which defense counsel seeks to question the witness should, "as tested by experience of human nature," have "some clearly apparent force" in causing the alleged interest or bias or motive to lie. 3A Wigmore on Evidence § 949 at 784 (Chadbourne rev. 1970). Or, put another way, the facts or circumstances sought to be explored should not be too remote in terms of their effect on the witness' motives. *Id.* What is important is what is in the mind of the witness, *United States* v. *Campbell,* 426 F.2d 547, 549 (2d Cir. 1970), and what effect a particular event or circumstance could be expected to have on his thinking and motives. *Gordon* v. *United States,* 344 U.S. 414, 422 (1953). Within the above framework, a general standard is applied for judging whether or not a trial court has properly limited the scope of cross-examination. In *United States* v. *Lipton,* 467 F.2d 1161 (2d Cir. 1972), *cert. denied,*

410 U.S. 927 (1973), the Court quoted with approval the words of Judge Hays in *United States* v. *Campbell, supra*:

> In determining whether the trial judge has abused his discretion in limiting the introduction of such [impeaching] evidence, the issue is whether the jury was otherwise in possession of sufficient information concerning formative events to make a "discriminating appraisal" of a witness' motives and bias. 467 F.2d at 1166.

In their briefs appellants argue that if they had been permitted to question McCrea concerning the events of September 9, 1972, they would have been able to show that he began working for the Government in order to avoid prosecution for a serious crime.* This showing would have enabled them, they suggest, to launch a persuasive assault on his credibility as a witness at their trial.

Appellants' claims are without merit. First of all, whatever McCrea's reasons were for becoming an informant in 1972, they have no relevancy to his motives for testifying in 1974. More pertinently, however, there is simply no rational basis for arguing, as appellants do, that the incident of September 9 was a force for bias in McCrea's mind when he testified. At the time of appellants' trial, McCrea had already pled guilty and been given a conditional discharge for the reckless endangerment. In addition, he stated that he was not then under indictment or charged with any criminal offense. Quite clearly, "bias is a state of mind, and only those events which can influence the mind at the moment of testifying are relevant to a demon-

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* Appellants rely on the transcript of McCrea's pleading in November of 1973 to show the alleged gravity of the offense (Defendant's Exhibit E). As Judge Mishler pointed out, however, McCrea's entrance of a guilty plea could have merely been part of a plea bargain (343).

stration of bias." *Austin* v. *United States*, 418 F.2d 456, 457-458 (D.C. Cir. 1969). If, because of the reckless endangerment charge, McCrea was in some way motivated at the time of trial to testify falsely, it would have had to have been because of either fear or gratitude. In this case, however, to suggest, as appellants do, that McCrea would have lied to ingratiate himself with the Government is to rely on the most tenuous speculation. To argue that he would have lied out of fear is to assert that he testified falsely because of a threat that did not exist. Either way, the argument fails.

Judge Mishler's ruling clearly met the standards laid down by Judge Hays in the *Campbell* case, *supra*. At the trial of appellants the jury had before it a multitude of information on the basis of which it could determine McCrea's credibility and evaluate his motives and bias. On direct examination, McCrea himself disclosed his two convictions and admitted that he had at one time been a narcotics dealer (33-36). In addition, he testified that he was paid for his work, and both he and Agent Jones told the jury that the Drug Enforcement Administration had spoken on his behalf, and had sent letters to the Kings County District Attorney's office and the state court, in connection with the reckless endangerment charge (514-515, 555-558). On cross-examination, McCrea was subjected to full and searching inquiry by counsel for both appellants, who were given wide latitude by Judge Mishler. In addition to asking him about the factual details of the case, counsel questioned McCrea at length about his prior convictions (228-229, 308-312, 334-335, 355-359, 421-426); his former activities as a narcotics dealer (307-308, 368-369, 370-373); and his relationship with the Drug Enforcement Administration, with particular emphasis on what McCrea had to gain by working as an informant for the DEA (331-332, 442-445, 451-452, 456).

Based upon the foregoing, there can be no question that the jury in this case was well equipped to evaluate McCrea's credibility. Thus, by his refusal to permit defense counsel to cross-examine on the underlying facts of the reckless endangerment charge, Judge Mishler struck the proper balance between allowing appellants to establish McCrea's motives and bias and preventing the trial from becoming sidetracked on remote and collateral issues. *United States* v. *Dorfman*, 470 F.2d 246 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973).*

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* The numerous decisions which deal with limiting the scope of cross-examination aimed at showing bias and motive all, necessarily, turn on their particular facts. The following cases, however, present instances where information similar or analogous to that sought to be introduced by appellants in this case was held properly excluded: *United States* v. *Conrad*, 448 F.2d 271 (9th Cir. 1971) (excluded was information that accomplices who testified against a co-conspirator had been arrested, but not indicted, on charges arising prior to the date of the alleged conspiracy); *United States* v. *Marks*, 368 F.2d 566 (2d Cir. 1966), *cert. denied*, 386 U.S. 933 (1967) (after it was established that bribed revenue agents were testifying for the Government in hopes of leniency, it was proper to prohibit cross-examination by the defendant in a bribery case as to other instances of bribery by the agents); *United States* v. *Miles*, 480 F.2d 1215 (2d Cir.), *cert. denied*, 414 U.S. 1008 (1973) (defendant prohibited from exploring the facts underlying departmental charges pending against a police officer who testified against him for the Government, where the fact of the charges and the witness' hopes for leniency had already been established).

POINT II

Judge Mishler's conduct of the case in no way deprived appellants of a fair trial.

Appellants contend that Judge Mishler's conduct of the case denied them a fair trial. They center their complaint on the trial court's actions during the cross-examination of McCrea (227-463). It is alleged that Judge Mishler improperly intervened in the questioning and that by expressions of "irritation and displeasure" with defense counsel he established in the eyes of the jury "a judicial posture of hostility toward the defense."

The task of the judge in a criminal case is to see that the defendant is given a fair trial. *United States* v. *Nazzaro*, 472 F.2d 302, 303-304 (2d Cir. 1973). Accordingly, the ultimate question which must be answered in any appeal involving alleged judicial misconduct is whether or not the actions of the trial court in some way "weighted the scales" against the defendant. *United States* v. *Dennis*, 183 F.2d 201, 225 (2d Cir. 1950), *affirmed*, 341 U.S. 494 (1951). In answering that question this Court has stated that it will closely scrutinize "each tile in the mosaic of the trial" to determine whether "instances of improper behavior or bias, when considered individually or taken together as a whole," deprived the defendant of a fair trial. *United States* v. *Nazzaro, supra*, 304.

However, while the trial court must avoid at all times even the bare appearance of partiality, *United States* v. *Nazzaro, supra*, 310, the judge is still given wide discretion in the conduct of the trial. When circumstances require, he may admonish counsel for unnecessary and improper questions, *United States* v. *Glaziou*, 402 F.2d 8, 17 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969), and he is entitled to interrupt the examination of witnesses and to ask questions himself, in order to clarify the issues of the trial.

United States v. *Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960); *United States* v. *Pellegrino*, 470 F.2d 1205, 1206-1208 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973).

When viewed in the light of the foregoing authority and in the context of the record in this case, appellants' arguments are revealed as being totally without merit. To begin with, inherent in the claims made by appellants is the contention that somehow their cross-examination of McCrea was stifled by Judge Mishler.* This is simply not so. Defense counsel's questioning of McCrea covered a full day in the trial and accounts for well over 200 pages of the transcript. Moreover, as discussed above,** the questioning of McCrea by defense counsel was thorough and far reaching. More fundamentally, however, the interruptions by Judge Mishler of which appellants complain were, for the most part, for the purpose of sustaining, sometimes *sua sponte*, objections to questions which were either improper, immaterial or irrelevant (302, 310, 342, 445-446). In addition, almost all of the "expressions of displeasure" which appellants cite, many of which were warranted, were made outside of the presence of the jury (119, 122, 125,

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* Appellants lay emphasis on the claim that Judge Mishler allegedly misunderstood the thrust of their cross-examination concerning McCrea's prior drug dealings, arguing that they wished to pursue this line of questioning, not to impeach, but to show bias (Brief for appellant Little at 29). On the contrary, in the course of cross-examination Judge Mishler did allow counsel to question McCrea on this point, specifically stating that he was doing so because, "at least theoretically," McCrea still had the possibility of prosecution for his involvement in the narcotics traffic hanging over his head (350-351).

Appellants even go so far as to contend that Judge Mishler somehow acted improperly by the way in which he permitted defense counsel to pursue a line of questioning which he initially prohibited (Brief for appellant Little at 30-31, 323-326).

** See page 15, *supra*.

306, 315-316). Moreover, when it was required to do so, the trial court admonished government counsel in front of the jury (252, 307, 714), and, on appropriate occasions, it properly ordered struck from the record improper responses by witness McCrea (42, 52).

The record reveals that the decisions upon which appellants rely are clearly based on facts in no way similar to those in this case. In the *Nazzaro* case, in addition to rehabilitating a prosecution witness and taking an active part in the cross-examination of defense witnesses, the trial judge engaged in numerous acrimonious exchanges with defense counsel in the presence of the jury. *United States* v. *Nazzaro, supra,* 307-308, 311. In *United States* v. *Brandt* 196 F.2d 653, 655-656 (2d Cir. 1952), the court actively cross-examined defense witnesses, including the defendant himself, while the *Coke* and *Guglielmini cases* involved trials where the judge continually harassed and disparaged defense counsel in the presence of the jury. *United States* v. *Coke,* 339 F.2d 183, 185 (2d Cir. 1964); *United States* v. *Guglielmini,* 384 F.2d 602, 604-605 (2d Cir. 1967).

In contrast, one has only to look to the words of Judge Oakes in the case of *United States* v. *Boatner,* 478 F.2d 737 (2d Cir.), *cert. denied,* 414 U.S. 848 (1973), for an apt description of the kind of fair and impartial treatment which characterized Judge Mishler's handling of this case:

> . . . In contrast to *United States* v. *Nazzaro, supra* and *United States* v. *Dellinger, supra,* the trial court's comments did not create an impression that he personally believed in the appellant's guilt. *United States* v. *Pellegrino, supra,* 470 F.2d at 1207; *United States* v. *Brandt,* 196 F.2d 653, 656 (2d Cir. 1952). The trial court's comments were directed exclusively at the conduct of appellant's counsel, not . . . at . . . the strength of [appellant's] case. *United*

States v. *Ross*, 321 F.2d 66, n. 3 (2d Cir.), *cert. denied*, 375 U.S. 894 (1964). While the trial court's annoyance was directed primarily at defense counsel, the prosecutor too received a share. More importantly, the trial court's rulings on objections during the trial were . . . evenhanded and displayed no bias toward one side or the other. 478 F.2d at 740.

POINT III

Judge Mishler properly permitted tape recordings of conversations between the Government informant and appellants to be played to the jury.

Appellants' final two claims on appeal relate to the admission in evidence at their trial of tape recordings of conversations between themselves and McCrea. In particular, it is argued that Judge Mishler abused his discretion when he permitted to be played to the jury recordings of the conversation which took place between McCrea and appellant Smallwood on the night of November 30th in the automobile owned by McCrea's girlfriend. Appellants contend that it was improper for this conversation to be admitted, because substantial portions of the tapes were allegedly "inaudible and unintelligible." Appellants' second claim concerning the tapes is a Constitutional one; they assert that the admission in evidence of the recordings of the November 30th conversation and the telephone calls of November 2nd, 5th, 21st, 28th and 29th violated their Fourth Amendment rights to privacy, because they were the product of warrantless electronic surveillance. Both of these claims are totally without merit.

It is a well settled rule in the Second Circuit that it is for the trial judge, in his discretion, to rule on the admissibility of tape recordings, taking into account, in particular, the factors of audibility and probative value.

United States v. *Kaufer*, 387 F.2d 17, 19 (2d Cir. 1967); *United States* v. *Weiser*, 428 F.2d 932, 937 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); *United States* v. *Bryant*, 480 F.2d 785, 790 (2d Cir. 1973). In this case, Judge Mishler followed the proper procedure. Upon being advised that the Government would seek to introduce tape recordings, he held a pre-trial audibility hearing. After listening to the November 30th tapes, he held that the quality of the recordings ranged from "inaudible to fair."* Those portions of the tapes which he found to be either "blank, inaudible or irrelevant" Judge Mishler ruled were inadmissible. A substantial part of these inadmissible portions covered the period during which McCrea alone, and later McCrea and appellant Smallwood together, were inside the apartment at 303 Jefferson Avenue. Those portions of the tapes which Judge Mishler found to be audible were permitted to be played to the jury. A substantial portion of these audible segments of the tapes was comprised of McCrea's and appellant Smallwood's conversation in the automobile.

Judge Mishler properly exercised his discretion when he selectively admitted portions of the November 30th tape recordings. By excluding blank, inaudible and irrelevant portions of the recordings, he prevented the court's and the jury's time from being wasted. Most importantly, however, those portions of the recordings which were admitted were both relevant and probative.

To begin with, the trial court found as a matter of fact that the admitted portions of the tapes were audible. Moreover, although those portions do contain unintelligible segments, those segments are clearly not sufficient to weaken the trustworthiness and evidentiary value of the recordings. See *Monroe* v. *United States*, 234 F.2d 49, 55 (D.C. Cir.

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* See Judge Mishler's Memorandum of Decision of May 20, 1974 (Appellants' Appendix at A-9).

1956), *cert. denied,* 352 U.S. 873 (1956), cited in *United States* v. *Bryant, supra* at 790. Contrary to the claims of appellants, there emerges from these recordings conversation between McCrea and appellant Smallwood which, although somewhat broken, is essentially coherent and understandable. Viewed in this light, the probative value of the November 30th tapes can hardly be challenged. The recordings showed McCrea and Smallwood alone together discussing, in general, various aspects of the narcotics business and, in particular, the purchase and sale of a quantity of heroin. They thus, as appellants concede, provided important corroboration for the testimony of McCrea concerning his dealings with appellants.*

Equally without merit are appellants' claims that the admission in evidence of the tapes of the phone calls, in addition to those of the November 30th conversation, violated appellants' Fourth Amendment rights to privacy. Such an argument was foreclosed by this Court in *United States* v. *Kaufer,* 406 F.2d 550, 551-552 (2d Cir.), *affirmed,* 394 U.S. 458 (1969), where it was held that only the consent of one party to a conversation is required to validate the electronic surveillance and recording of the conversation. See also *United States* v .*White,* 401 U.S. 745 (1971).

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* Additionally, it is to be remembered that McCrea testified and was subject to cross-examination concerning his conversation with Smallwood.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: November 21, 1974

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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APPENDIX

Transcript of Telephone Call
(Government Exhibit 1-B)

Hello
Hello
Unintelligible
Yea, can I speak to RED?
RED?
Yea
Yea, hold on
Hello
Hey RED?
Yea
Hello
You there (or "who's this")
It's JOHN
Oh what's happening
Alright, so you ready
Yea (or unintelligible) I gotta, I gotta wait a little while until the boy comes back.
Alright so
Call me back in about a half an hour or forty five minutes
Half an hour or forty five minutes?
Yea!
Alright
OK

Transcript of Telephone Call
(Government Exhibit 1-C)

Hello

Hello, can I speak to RED please?

Hold on a minute

OK

RED! Yo RED!

unintelligible

Hello, RED

Uh huh

JOHN

The boy didn't come back yet. Is there anywhere I can call you?

Huh

Is there anywhere I can call you?

Anywhere you can call me now?

You known when he (or "you") come back

Alright I tell you what. I'm gonna be, I'm downtown now.

Right

Uh huh

And I'll be over by JUNIOR'S, off of Flat, off of Fulton and ah and Flatbush.

Uh huh

And I'll call you from there. Then you can come over there and meet me there.

OK Good enough

——————— know I'll be in the bar there having a drink.

Right

OK

Alright

Right

Transcript of Telephone Call

(Goverment Exhibit 1-D)

Hello

Hello

Yes

Yea can I speak to RED please

Hold on

Right

Yea

Yea, how you doing?

OK

Alright it's JOHN

Ah huh

I just got back in town, man

Good (or "yea")

Yea, from Baltimore, ah listen, what time you want to meet me

Ah make it about six

Six o'clock

Yea

Alright listen that be a good time, alright cause I mean I just got in you know so I figure I call you know to make sure everything is alright

Right

Listen, now don't hang me up and shit man

OK

Listen you know where I'll be at?

Where?

I'll be at, at JUNIOR'S, you remember, I told you where I was going to be.

Ah huh

You know here it's at right?

Yea

You, you sure you know?

YEA, I know where JUNIORS at

Alright well I'll be in JUNIORS (or unintelligible) at six o'clock

OK
Alright, don't hang me up now
Right, OK
OK I'll be there
Right

Transcript of Telephone Call
(Government Exhibit 2-B)

Hello
Hello, can I speak to RED
Wait a minute I'll see if he is in . . . he just left out
Uh, ha, you know what time he'll be back,
No, I don't, you'll hold on let me see if he's outside somewhere
OK
Hold on one minute
OK
Yea
Yea
Who's this John
Yea
Still waiting man. BABY BROTHER I told BABY BROTHER, BABY BROTHER said that you know, he's waiting too, he's at home
Uh ha
So everybody waiting
Alright, uh I'll call you back in about half an hour then
Okay
Okay
Right
Right

Transcript of Telephone Call
(Government Exhibit 2-C)

YEA
Hello, yea who is this
RED
Oh, John
I'm still waiting
Yea
Still waiting
Hey listen you think you going to have it or what
Yea, the man, the man, the man left and said he was going to get it
Oh, he went to pick it up
Yea
So uh what you want me to do wait or what wait awhile I guess I guess so huh
Yea, you know just call me back in about another hour
OK
OK
And you'll know one way or the other then
Right
OK good enough
OK
Alright

Transcript of Telephone Call
(Government Exhibit 2-D)

Hello
Hello, Hello
Hello
Can I speak to RED please
Alright just a minute
Yea
Yea, How are you doing?
Okay
You know who this is, right
John
Yea
Uh huh
Alright, hey what time you be ready
Uh, what's the best time for you
How about say two or three o'clock
Yea, that's a bet
Alright
OK
Listen where you want to meet you at
You call me when you're ready and I'll let you know
Call you okay, good enough
Right
Alright

Transcript of Telephone Call
(Government Exhibit 2-E)

Hello
Hello let me speak to RED please
Alright
Yea
Yea
Uh hum
Hello
Uh hum
John
Yea (pause) Boy was just be here
Uh ha
So it will be a little. He's gonna be a little later.
Alright listen
Uh ha
I'll tell you what, you want me, I'll meet you at the PHASE III at three o'clock.
OK
OK
Alright
Hey listen
Hu
Don't hold me up this time
Right, OK
Alright I'll be there at three
OK
Right

Transcript of Telephone Call
(Government Exhibit 2-F)

Hello

Hello can I speak to BABY BROTHER

BABY BROTHER, BABY BROTHER is not here

He's not there

No

How about RED

Yea RED is here, hold on

Yea

How you doing

Yea OK

OK so what's happening

What time you be ready

What time I'll be ready

Uh ha

I'm ready now

Alright let me call him and call me (or "him") back in about half hour

In half hour

Yea

Hey RED

Don't give me this bull shit like you gave me yesterday

No, hey man (unintelligible) Bar I wasn't about to go over there

Hey listen I know I split from there myself, you know I split from there, BABY BROTHER split from there, everybody split from there.

That's what I'm saying

But, huh, alright when I call you back then you know pick a place where we gonna meet and shit or what.

OK

Alright

Right

OK

Transcript of Telephone Call
(Government Exhibit 2-G)

Hello
Hello, how are you doing
Alright
Alright
How you been doing
OK
Did they tell you I called earlier today
Yea but I was out all day
Where you at now
Huh
Where you at now?
I'm calling from downtown
Downtown
Yea
What time you gonna get back uptown
Ah shortly that's why I'm calling you now, you know, because you told me you know you know, now because you told me you'd probably be ready about six. Hey listen
Yea
You gonna be ready man or what
Hold on a minute, please
Alright
Hey
Yea
The guy suppose to be delivering it, delivering it to me now, dig what I'm saying
Uh hu
That why I'm gonna wait for it now
Uh hu
So like uh, he should have been here, he should have delivered it at 4 o'clock that what time he was suppose that what time I told him to bring it
Yea

So like uh I'm going to give him another half hour
Yea
and then I'll know for sure and if he ain't here in half hour, fuck him
Uh huh
Alright
Then what you gonna do then
Huh
Then what you gonna do then
I gonna go to the man and get one for you
Alright listen, so you want me to call you in half hour
Right, please
Alright
OK
OK, I'll call you in half hour and you'll let me know one way or the other then what we gonna do right
Right
OK
So, I'll see you later
OK

Transcript of Telephone Call (Government Exhibit 2-H)

Hello
Hello
What's happening
How are you
Alright
Huh?
Alright
So
So I guess I'm we'll just have to get it somewhere else. Have you checked around the spot? Have you seen anybody else with anything.
Huh
Have you seen anybody else with anything

Yea that's what I was doing today

Did you see anybody

Yea I checked with a few people man but you know they ain't had nothing I want you know

Oh was it garbage or what

Yea

That's what I figure. Same problem I been having. Like this guy I been waiting for today is the only one I know that got true true things, dig what I'm saying

Uh hu

So that's the reason why I been waiting for him—I already got something bad from another dude. I don't want to mess with him no more. So I don't know, I don't know. Where you at, you still there downtown?

Yea man, I gotta do something you know

You go on to do what you can and let lets not and if I get the thing tonight you can get something from me, OK

When though

Huh

When

I don't know I'm trying to get it

Hey just listen, listen

Yea

Like uh, I like uh gonna I don't wanna be awaiting around you know all night or something you know and nothing will come through unless we could do something maybe tomorrow morning or something like that you know

Any chance of me calling you back at about eight o'clock

Yea OK

Where can I call you, you call me

Alright I'll do that

You call me at eight and if it ain't happening [illegible] after I don't know—I got to get some more, I'm telling you I got to

Alright

So I'll see you later on

OK

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Brief and Appendix for the Appellee

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McCarthy and Dorfman
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Mineola, N. Y. 11501

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Brooklyn, N. Y.

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Lydia Fe

LYDIA FERNANDEZ

Sworn to before me this
21st day of November 1974

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4507764
Qualified in Kings County
Commission Expires March 30, 19

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